

SERVED: March 5, 1997

NTSB Order No. EA-4529

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 18th day of February, 1997

_____	)	
BARRY L. VALENTINE,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14454
v.	)	
	)	
JAMES FARR,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The respondent by counsel has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on July 31, 1996, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an April 2, 1996 emergency order that revoked

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

respondent's private pilot certificate (No. 182363828)<sup>2</sup> on the ground that he had twice failed airman competency re-examinations requested by the Administrator pursuant to 49 U.S.C. Section 44709.<sup>3</sup> For the reasons discussed below, the appeal will be denied.<sup>4</sup>

Respondent's appeal presents a very narrow issue for review. He does not argue that the Administrator lacked a reasonable basis for requesting a retesting of his qualifications to hold a private pilot certificate, and he does not directly contend that the law judge erred in crediting the testimony of FAA inspectors over respondent's as to whether his answers to questions on the two re-examinations, given orally on September 18, 1995 and on February 29, 1996, demonstrated an adequate command of the subject matter covered.<sup>5</sup> Rather, the single challenge pressed by the respondent involves the manner in which the re-examinations were administered; namely, the fact that neither exam was recorded either stenographically or by tape recording.

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<sup>2</sup>The respondent waived expedited handling of his appeal from the emergency order.

<sup>3</sup>Section 44709(a), 49 U.S.C., grants the Administrator authority to reexamine, "at any time," those who hold airman certificates and Section 44709(b) authorizes the Administrator to revoke an airman certificate if he "decides after conducting a...reexamination...that safety in air commerce or air transportation and the public interest require" such action.

<sup>4</sup>The Administrator has filed a reply opposing the appeal.

<sup>5</sup>The initial re-examination request resulted from an investigation of an incident on August 9, 1995, in which respondent allegedly deviated from air traffic control instructions concerning his heading on a flight in the vicinity of Allentown, Pennsylvania.

Respondent contends that without a record of the reexaminations, a meaningful review of his performance on the tests is not possible, and, therefore, any revocation based on the alleged exam failures violates his right to procedural due process. We find no merit in the contention, which, we think, is more appropriately viewed as either an attack on the sufficiency of the evidence relied on by the Administrator to establish his case or as an indirect effort to have us overturn an adverse credibility assessment made by the law judge.

That an airman certificate may represent a property interest that cannot be arbitrarily taken away does not necessarily mean that the methods by which the Administrator concludes that an airman is no longer qualified to hold a certificate are subject to due process scrutiny. The issue, rather, is whether adequate review of the decision resulting from whatever methods the Administrator chooses to employ is available. Since, in our judgment, an appeal to the Board provides an airman with an effective procedure for contesting, in an adversarial context, the legal validity and evidentiary foundation of the Administrator's certificate judgments, the quantum or character of the evidence the Administrator actually adduces at hearing is of no constitutional moment, for his order will not be sustained by the Board if he reached his certificate judgment in a way that did not produce or preserve enough evidence of the calibre necessary to meet his burden of proof.<sup>6</sup> An appeal to the Board

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<sup>6</sup>The party with the burden of proof in a Board proceeding

is, in other words, the process due an airman whose certificate has been affected by an order of the Administrator.

In light of the foregoing, the assertion that no meaningful review of the Administrator's order could be accomplished in the absence of a record of the questions the respondent was asked and of the answers he gave must be evaluated not as an issue of constitutional dimension but as a question of evidentiary sufficiency. Thus viewed, we have no hesitancy in rejecting the implied premise that the testimony of FAA inspectors as to an airman's performance on a competency re-examination does not constitute evidence sufficient to establish the Administrator's case on the issue of an airman's qualifications. The respondent had a full opportunity to cross examine the inspectors as to the basis for their beliefs that he lacked the aeronautical knowledge required of a private pilot and to dispute their accounts of his performance on the oral tests they administered. The law judge, notwithstanding respondent's insistence that he had answered all questions correctly, credited the testimony of the inspectors over that given by the respondent. Such credibility assessments fall within the exclusive province of the trier of fact to make, and the respondent's position on the need for a recording of oral examinations does not establish a valid reason for us to disturb the law judge's findings in this regard.

(..continued)  
must establish his case by a preponderance of reliable, substantial, and probative evidence.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied, and
2. The initial decision and the emergency order of  
revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA,  
and BLACK, Members of the Board, concurred in the above opinion  
and order.